No. 109

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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., ... *Petitioners,*

versus

JOHN HENDERSON, Bowling Green, Ky., ... *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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(Opinion below reported 264 S. W. (2) 680

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

John and Minnie Mae Henderson, an old childless couple who were married in 1892, had accumulated in their joint bank account and p r i v a t e lock box approximately $20,000.00 by 1947. John claims that this was all his money that he turned over to Minnie, who did all the banking.

From the savings, without John's knowledge or consent, Minnie purchased twenty $1,000.00 Series E. Savings Bonds. She put fifteen of these bonds in her name with Irvin B.

Bewley as co-owner, three in her name with Elmer Sanders as co-owner, and two in her name with Helen Witchell as co-owner.

These purchases were made surreptitiously, in violation of her confidential relationship with John, and under such conditions as to constitute a fraud against him. There is testimony to the effect that she was mentally deranged at times during the period of time involved in the purchase of these bonds because of pain, narcotics, and age.

Minnie died intestate, and upon being appointed administrator of Minnie's estate, John opened the lock box and found the twenty bonds in dispute in this case instead of the cash he expected. He refused to surrender the bonds to Bewley, Sanders and Witchell and they instituted litigation in the Warren Circuit Court at Bowling Green, Kentucky to recover the bonds. The lower court awarded ten of the bonds to John under a constructive trust theory because of the fraud practiced on John by Minnie, and awarded ten of them to Bewley on a gift *causa mortis* theory based on the idea that Minnie helped John conserve the cash that went into the bonds, and that she, therefore, was entitled to half the bonds as a matter of equity and could do with them as she pleased.

The Court of Appeals of Kentucky, which is Kentucky's Court of last resort, ruled that when Minnie took the money from their joint lock box without John's knowledge, she practiced a fraud on him; therefore, the constructive trust should be imposed, in his favor, upon ten of the bonds; that the other ten bonds belonged to Minnie's Estate and, therefore, should be distributed under the laws of descent and distribution of Kentucky, five to John as the surviving spouse and the other five to Minnie's heirs at law. The lower court was reversed on its theory of a gift *causa mortis* for the reason that the es-

sential element of delivery was lacking, it appearing that Bewley did not even know of the existence of the bonds in his name.

The Court of Appeals of Kentucky ruled that the Chancellor should by contempt proceedings require Bewley, Sanders and Witchell to endorse the bonds so John could cash them and carry out the judgment of the court, it appearing that the Treasury Department of the United States has declined to cash the bonds unless endorsed by Bewley, Sanders and Witchell. (Pp. 64A-68A, Appendix to Petition for Writ of Certiorari filed April 9, 1954).

Bewley, Sanders and Witchell have filed a petition for a Writ of Certiorari in the Supreme Court of the United States seeking to invoke the jurisdiction of the Supreme Court of the United States on the theory that a Federal question of substance is involved in the case.

ARGUMENT

It is the Respondent's petition that this case does not involve a situation in which a state court has decided a Federal question of substance not theretofore determined by the United States Supreme Court, nor does this case present an instance in which the state court has decided the matter in a way probably not in accord with applicable decisions of the United States Supreme Court, nor are there any special and important reasons why the United States Supreme Court, in the exercise of its sound discretion, should issue a writ of certiorari in this case. (*Rules of United States Supreme Court*, Rule 38, Sections 5 and 5a), Rule 19 of 1954 issue).

Nor does this case involve a situation in which the validity of a statute of the United States is drawn in question, nor does it involve a situation in which any right, title, privilege or im-

munity is specially set up or claimed under the Constitution of the United States or under any of the treaties or statutes of or commission held or authority exercised under the United States. (Title 28, *U. S. C. A.* 1257, Sub Section 3.)

In spite of what may appear in the Petition for Writ of Certiorari submitted April 9, 1954, the REAL question involved herein is as set forth in the opinion of the Court of Appeals of Kentucky. This question is specified and defined as follows:

> "The general proposition that a constructive trust can be declared in favor of one who has been defrauded is recognized in McCracken County v. Lakeview Country Club, 254 Ky. 515, 70 S. W. 2d 938. The question for our determination is, CAN A CONSTRUCTIVE TRUST BE DECLARED IN UNITED STATES SAVINGS BONDS, SERIES E, IN FAVOR OF A DEFRAUDED PERSON? (Emphasis ours) The question is answered in the affirmative in the cases of Katz v. Driscoll (1948), 36 Cal. App. 2d 313, 194 P. 2d 822; and Ibey v. Ibey (1945), 93 N. H. 434, 43 A. 2d 157.
>
> "When Minnie took the money from their joint lock box without John's knowledge, SHE PRACTICED A FRAUD UPON HIM; THEREFORE, A CONSTRUCTIVE TRUST SHOULD BE IMPOSED, (emphasis ours) in his favor, upon the ten bonds; two of which were in Minnie's or Helen Witchell's name; three in Minnie's or Elmer Sanders' name; and five in Minnie's or Irvin Bewley's name." (P. 67A of Appendix to Petition for Writ of Certiorari submitted April 9, 1954.)

That the Treasury Department of the United States recognizes the propriety of a state court awarding United States Savings Bonds to the real owner, as distinguished from the registered owner thereof, is clear.

I respectfully refer the Court to Section 315.13, Subpart D, *United State Treasury Department Regulations, Governing United States Savings Bonds*, Department Circular 530, Seventh Revision, dated May 21, 1952, which is as follows:

"SEC. 315.13. JUDICIAL PROCEEDINGS (JUDGEMENT CREDITORS, TRUSTEES IN BANKRUPTCY, RECEIVERS OF INSOLVENTS' ESTATES AND CONFLICTING CLAIMANTS). A claim against an owner or co-owner of a savings bond conflicting claims as to ownership of or interest in such bond as between co-owners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows:

"(1) No proceedings will be recognized if they would give effect to an attempted voluntary transfer inter vivos of the bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving co-owner or beneficiary.

"(2) A judgment, creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller.

"(3) If a debtor, or bankrupt, or insolvent, is not the sole owner of the bond, payment will be made only to the extent of his interest therein, which must be determined by the court or otherwise validly established.

"A divorce decree ratifying or confirming a property agreement between husband and wife or otherwise setting their respective interests in savings bonds will be recognized and will not be regarded as a proceeding giving effect to an attempted voluntary transfer for the purpose of this section."

The following decisions are cited for the purpose of showing that there is no Federal question involved in this case and that the courts throughout the land have recognized that there is nothing in the Treasury Regulations that forbids the judi-

ciary, both State and Federal, to recognize and enforce the real ownership, of United States Savings Bonds, in proper cases, even though the real ownership may differ from the registered ownership.

1. *Dietzen v. American Trust & Banking Co.*, 131 S. W. 2d 69, 175 Tenn. 49. In this case the Tennessee Court recognizes the validity of a gift *causa mortis* of United States Savings Bonds where the validity of such gifts was established by judicial proceedings.

2. *In re Laundree's Estate*, 91 N. Y. S. 2d 482, 195 Misc. 754, Reversed on other grounds, 100 N. Y. S. 2d 145, 277 App. Div. 994. In this case the Court held that the Treasury Regulations to the effect that a surviving beneficiary of United States Savings Bonds would be recognized as the sole owner of the bonds, are not intended to prevent a legal representative from pursuing, in the interest of creditors, the proceeds of bonds fraudulently transferred to a beneficiary without consideration.

3. *In re Bartlett*, D. C. N. Y. (1947) 71 F. Supp. 514. The Court here held that where Series E. United States War Savings Bonds were purchased in the name of the bankrupt payable on his death to his mother, the beneficiary did not have an interest in the bonds, but the bankrupt was sole owner of the bonds, and he was properly directed to surrender the bonds to the bankruptcy trustee.

4. *Hausfelder v. Security-First Nat. Bank of Los Angeles*, 176 P. 2d 84, 77 Cal. App. 2d 478. Plaintiff who, with decedent, rented a safety deposit box as "joint tenant" with right of survivorship was not precluded from obtaining title to Government Savings Bonds deposited by decedent and payable to decedent on ground of Treasury Regulations prohibiting transfer, etc., where plaintiff's ownership was established by

a judicial proceeding and plaintiff's sole ownership was not acquired by "voluntary transfer *inter vivos*" prohibited by the regulations but only by virtue of the decedent's death.

It is respectfully submitted that by the express provisions of Sec. 315.13 of Subpart D, quoted above, the right of a state court to award the ownership of bonds to a person other than the registered owner is recognized.

The above quoted Sec. 315.13 says "...conflicting claims as to ownership...will be recognized when established by valid judicial proceedings..."

The language is plain. The intent is plain. "Valid Judicial Proceedings" shall govern as to ownership of bonds. No mere method of registration shall be allowed to defeat real ownership determined by our courts.

It is respectfully submitted that the above referred to Treasury Regulations themselves absolutely cut the ground from under the Petitioners.

To hold that a bureaucratic regulation may be used as a method to avoid civil liability arising from breach of trust or fraud or embezzlement and unjust enrichment would be an abomination.

It was for the purpose of avoiding just such an undesirable result that the court held in the case *Makinen v. George*, 19 Wash. 2d 340, 142 Pac. 2d 910 that there was no inconsistency between the Treasury Regulations specifying that the registered owner of a bond must be recognized as the owner and a judgment of the court designated the owner as one other than the one designated on the bond. The court properly held that the real owner, that is the one designated by the state court as the real owner, is in fact the owner and entitled to the proceeds of the bond.

To the same effect is *Williams v. Letton*, 228 Ky. 371, 15 S. W. 2d 296 and the other cases cited in *Moore's Admr. v. Marshall*, 196 S. W. 2d 369, 302 Ky. 729.

The court in Moore's Admr. v. Marshall, *supra*, held that under the facts in that case, Series E. Bonds were not the subject of a VOLUNTARY gift *inter vivos*. In that case the court held that six Series E Bonds issued in the name of H. C. Moore as registered owner were not transferable by gift *inter vivos* to Helen Marshall. The reason given for this holding was that the bonds were issued to H. C. Moore and registered in his name pursuant to a contract with the United States Government. By the terms of this contract as embodied in the bonds and pertinent Treasury Regulations the same were not transferable. The court said that this contract with regard to all its terms and conditions, including its non-transferability features was enforceable and that, therefore, H. C. Moore could not make a voluntary gift thereof to another individual. In the opinion in this Moore's Administrator case, Chief Justice Reece pointed out that the reason the non-transferability feature contained in the bonds and the pertinent Treasury Regulations was "...to encourage thrift and savings by small investors."

The reason for the non-transferability feature being valid, worthwhile and in accord with public policy, that particular feature was enforced by our Court of Appeals in its opinion above referred to.

I want to emphasize that the restriction is only against VOLUNTARY GIFT, sale, or pledge of bonds and does not serve to restrict the subjection of same to a constructive trust. A constructive trust of course, far from being voluntary, is imposed by the court against the wishes of the holder of the corpus in order to avoid an injustice, which is just the situation we have in the case at bar.

The reasoning in the cases cited *supra* recognizing the exceptions set out in the Treasury Department Regulations providing that no one can cash bonds except the registered owner is sound and fundamental.

But we have to look at the purpose of these Treasury Regulations to fairly evaluate them.

As set out in the Moore opinion, the purpose of restricting transferablility of Savings Bonds is two fold:

> "The Act of Congress and the Treasury Regulations had two objectives: (1) To obtain money for the United States Government; and (2) to encourage thrift and savings by small investors. The non-transferability feature w a s intended to accomplish the second objective, and for that reason the limitation on transfer was made all inclusive. That the limitation was intended to include transfers by gift is suggested by the regulation relative to creditors' rights and judicial proceedings which provides:
>
> "'A Savings Bond will be paid to, but not reissued in the name of, the person found entitled thereto THROUGH JUDICIAL PROCEEDINGS, (emphasis ours) upon presentation and surrender of the bond; Provided, however, that no such proceedings will be recognized if they would give effect to an attempted VOLUNTARY (emphasis o u r s) transfer of the bond or would defeat or impart the rights of survivorship conferred by the regulations in this part upon co-owners and beneficiaries.' Code of Federal Regulations, 1940, Supl. Title 31, sec. 315.17."

The purpose of saying then that no one can cash savings bonds except the registered owner is to encourage thrift. The Treasury Department certainly intended to encourage thrift among small investors. But it cannot be said that the Treasury Department intends to encourage thrift by a thief of funds stolen or illegally abstracted or obtained by fraud in violation of a confidential relationship and therefore subject to a con-

structive trust—it does not intend to encourage thrift on the part of the party at fault and thereby deprive the true owner of the bonds of his rightful proprietorship therein.

Otherwise, fundamental principals of public policy would be grossly violated. Otherwise, an absconder could invest illegal gains in savings bonds registered in his name or the name of some other person of his choice, his wife, for instance, or a friend or an accomplice or even an innocent third party and thereby deprive the person whose funds has been absconded with of all title thereto.

The Court is most respectfully urged to particularly note the wording of the passage in the Moore case, quoting the Code of Federal Regulations above:

> "A SAVINGS BOND WILL BE PAID TO...THE PERSON FOUND ENTITLED THERETO THROUGH JUDICIAL PROCEEDINGS."

Is not this Federal Regulation set forth in the Moore case absolutely conclusive? Does it not clearly recognize that a judicial determination of ownership of a bond is final and binding regardless of the name under which the bond was bought?

It cannot be denied that under our law a constructive trust can attach to cash under a proper showing of fraud.

In other words, Mr. John Henderson's cash money, before it was converted to bonds could certainly be the proper subject of a constructive trust; similarly, if the cash money were invested in bonds and then subsequently the bonds were cashed, the money so derived, if identifiable, could be the subject of a constructive trust in his favor. Is it not absurd to say that a constructive trust could attach to the cash before it was put in bonds, and, likewise, the proceeds from the bonds if they were in fact cashed, could be the subject of a constructive

trust, but that during the interim, that is, while the money was in the form of bonds rather than cash, the bonds themselves could not be the subject of a constructive trust? Really, in essence the whole matter is one of identification of funds and the constructive trust can attach to the funds, whatever form, whether it be cash or bonds. To hold otherwise is unrealistic, legalistic reasoning that cannot stand the light of logical examination.

In the case at bar the Petitioners are asking the Supreme Court of the United States to take jurisdiction of this case for the purpose of deciding that the Court of Appeals of Kentucky has no right to prevent fraud by declaring a constructive trust in favor of the real owner of Series E Bonds.

The Treasury Regulations quoted *supra* specifically authorize State Courts to enforce the rights of REAL owners to Savings Bonds even though the real owner may not be the registered owner. The courts throughout the land have consistantly exercised this right.

No Federal question is involved in this case.

The real question in this case then, it is respectfully submitted, does not involve any part of the statuatory situation nor any part of the Rules of the United States Supreme Court situation in which a writ of certiorari may normally be expected to issue.

CONCLUSION

It is respectfully urged that a constructive trust CAN be declared in United States Savings Bonds Series E, in favor of a defrauded person. In this case, John Henderson the defrauded person, was properly held by the Court of Appeals of Kentucky, to be the cestui que trust of the bonds purchased

with money stolen from him, and he is entitled to have the same cashed by the Treasury Department, on surrender thereof, they having already been properly endorsed by the registered surviving co-owners thereof.

WHEREFORE, Respondent respectfully prays that Petition for Writ of Certiorari herein be denied.

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FILED
JAN 15 1955
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

No. 109 October Term, 1954

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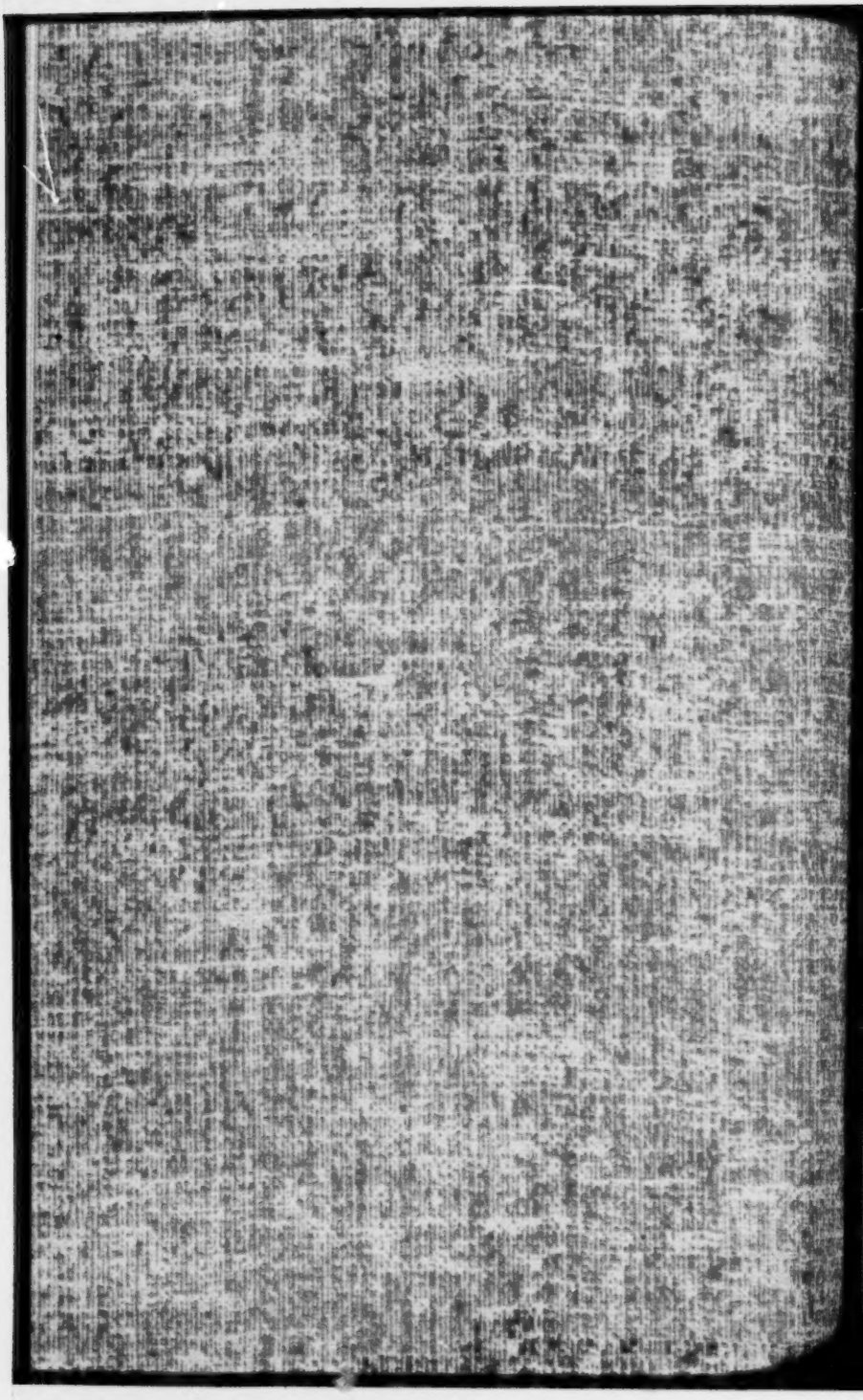

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

In addition to the authorities referred to in Respondent's Brief, filed on or about January 3, 1955, Respondent respectfully invites the Court's attention to the Annotation published in 37 A. L. R., 2d Series, Pages 1241 to 1243.

This Annotation under the heading "Effect of Fraud or Misconduct", makes specific reference to the Opinion of the Court of Appeals of Kentucky that is the subject of the Petition for the Writ of Certiorari in the case at bar. The recent opinions of the Courts of last resort of other states, to the general effect that a constructive trust may be set up by the judiciary in Series E. Savings Bonds and that the proceeds of those bonds may be paid to the beneficiary of such trusts, regardless of registration of the Bonds, in order to prevent fraud, are also referred to.

WHEREFORE Respondent renews his prayer for relief, as set forth in his original brief herein.

Respectfully submitted,

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